

BOARD OF APPEALS CASE NO. 4653	*	BEFORE THE
APPLICANT: Spencer Construction, Inc.	*	ZONING HEARING EXAMINER
REQUEST: Remanded by Circuit Court for Harford County for findings of fact to justify granting a variance;	*	OF HARFORD COUNTY
3805 Norrisville Road, Jarrettsville	*	Hearing Advertised
HEARING DATE: November 16, 1998	*	Aegis: 9/23/98 & 9/30/98
	*	Record: 9/25/98 & 10/2/98

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ZONING HEARING EXAMINER'S DECISION

This Case is before the Board on remand from a decision of the Harford County Circuit Court dated May 6, 1998. This matter was originally taken up by the Hearing Examiner in evidentiary hearings conducted on October 2, 1996, November 18, 1996 and February 3, 1997. The Hearing Examiner's decision approving the Applicant's request for modification of an earlier decision of the Board dated November 3, 1980 (Case No. 2697) and the area variance to permit a business use in excess of 2 acres was dated March 24, 1997. The Hearing Examiner's decision imposed 10 conditions on the grant of the requested variance. The Board of Appeals, after final argument on the case, ratified and adopted the decision of the Hearing Examiner, including the 10 conditions of approval, on September 16, 1997.

People's Counsel timely appealed the case to the Circuit Court for Harford County. In the Matter of the Application of Spencer Construction, Inc., Circuit Court for Harford County, Case No. 3902, May 6, 1998. Judge Marshall's decision, remanding the case to the Board, found that the Hearing Examiner, in Case No. 2697, dated November 3, 1980, had failed to make specific findings of fact that would justify the granting of a variance pursuant to Section 267-11 of the Harford County Zoning Code. Judge Marshall correctly surmised that the Hearing Examiner in the case sub judice determined that the decision of the Hearing Examiner in Case 2697 (1980 case) inherently made a determination that the property was unique, that that decision was final, and that the rules of res judicata would normally preclude a re-examination of that finding.

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Judge Marshall remanded the case with the following instructions:

“In the case sub judice, the Board’s decision is required to contain findings of fact as to whether or not the property is unique, and then a determination whether the literal enforcement of the Zoning Code would cause practical difficulty or unreasonable hardship with respect to the property. If the Board finds that the property is unique, it then must determine whether the property’s uniqueness causes the provisions of Section 267-38 of the Zoning Code to impact disproportionately on the property, as to use, when considering the request for modification of the variance, and, as to area, when considering the request for the area variance.”

On remand, the case came on for re-hearing before the hearing Examiner on November 16, 1998.

The Applicant’s business has been located on the subject parcel since 1975. The parcel is located in the Village of Jarrettsville on the north side of Maryland Route 23, approximately 2000 feet west of the intersection of MD Routes 23 and 165. The parcel consists of 6.232 acres, more or less, and is presently zoned VB At the time of the 1980 decision in Case No. 2697, the property was zoned B3. In Case No. 2697, the Applicant was granted a variance to allow cutting and assembly of wood materials into building components and allowed the outside storage of these components within a screened area At the time of the 1980 decision, the Applicant conducted a custom home building company and assembled roof trusses for use in the homes that it built. In 1980 there were 3 buildings on the property. The decision in Case 2697 approving the variance imposed four conditions on the approval:

- 1. All building materials either awaiting use on the property or the finished product should be stored inside the building or enclosed by a solid fence, either of chain link construction with panels bolted thereon, or by a stockade-type, rustic solid fence for security purposes;**
- 2. No signs advertising building components structures are to be permitted on the premises;**
- 3. Any addition or enlargement of the use, particularly involving structures, requires Board of Appeals’ approval;**

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4. A variance from the 200 foot required from an “R” district for outside storage is hereby granted, so that if storage is contained in the area enclosed on all sides there will be no violation.

In this case, the Applicant seeks to modify the conditions imposed by the Board in 1980 and seeks approval as follows:

1. A modification of the November 3, 1980 decision of the Board, in Case 2697, to allow the existing use of the property and to allow enclosed storage; or in the alternative,
2. A variance from Section 267-38(C)(5)(a) to allow for a business use in excess of two acres; and,
3. A special exception for construction service and supplies pursuant to Section 267-53(H).

The Hearing Examiner’s decision, dated March 24, 1997, granted the requested modification and area variance but did not address the request for special exception since the request for special exception was made as alternative relief in the event the modification was not approved. Applicant now argues that the request for special exception should also be considered on remand. While the Hearing Examiner agrees that, in the event the requested modification is not approved, the request for special exception can be addressed on remand, for the reasons that follow, the hearing Examiner finds no need to opine on the alternative relief requested.

The uses on the Spencer property have changed since 1980. There are five additional buildings located on the subject parcel, all of which were constructed pursuant to validly issued building permits Spencer’s business has also changed. It is no longer a custom home builder and now constructs roof trusses for sale to other home builders. The volume of roof trusses, the number of employees working on the property have all increased over the years. Spencer has moved its assembly operations into other buildings than those originally used in 1980 and now uses approximately 30% of the site for outside storage. A school bus operation on the site was approved pursuant to Board of Appeals Case No. 3030 dated December 12, 1983.

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The Harford County Code, pursuant to Section 267-11 allows variances, provided that the Board finds:

- (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Part 1 would result in practical difficulty or unreasonable hardship.
- (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.

I. Is the subject property unique within the meaning of Section 267-11?

Mr. Ted Scott appeared as an expert in site design both during the original hearing and the hearing of March 24, 1997. Mr. Scott testified that there were four separate components that show the uniqueness of this property including configuration, topography, adjacent uses and the septic characteristics. The witness testified that the property is irregularly shaped, wider in the front with narrowing to the rear. By using comparative width ratios, Mr. Scott determined that the width ratio of the subject parcel exceeded that of 9 other similarly situated properties in the Village of Jarrettsville. He concluded that this comparison demonstrates that the configuration of this site is A...certainly unique within the Village Business zoning in Jarrettsville on these subject sites. Mr. Scott also concluded that the site was topographically unique because the property drops in elevation from the front to the rear of the property, with most of the drop in elevation occurring in the first 200 feet. The witness stated that this was a characteristic unique to this property in the Jarrettsville business district. The witness explained that most VB business require high visibility at the front of the property but, because this property drops 20 feet in elevation front to rear, coupled with the front location of the septic area, this parcel could not have that high front portion visibility required by other VB businesses. On the positive side, the drop in elevation, according to the witness, is conducive to a use that requires screening as this use does.

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Mr. Scott testified that the property was also unique because of its location as a buffer or transition property between the residential uses and the commercial uses in the business district. This property is the fringe location separating commercial uses from the residential uses making this a unique parcel compared to other VB zoned parcels in the area. This is a less intense use than other commercial uses and is ideally suited for a transition use according to the witness.

The witness stated that most VB uses have a storefront and parking area located to the front of the property close to the road. The subject parcel, according to the witness, has the septic area located at the front of the property. The witness explained that perc tests and other natural wet areas to the rear of the property prohibit the location of the septic area anywhere but where it is located. This location pushes other uses rearward on the property, constraining the uses to the rear portions of the property.

Mr. Timothy Madden testified in both phases of this case and qualified as an expert in site plan design. Mr. Madden agreed with the conclusions reached by Mr. Scott and added that, because this property is the fringe property between business and residential uses, the requirements for screening and landscaping become more stringent than would otherwise be expected of interior properties within the VB district. In conclusion, Mr. Madden stated that in his opinion, hardship and difficulty would result if the provisions of the Code were literally enforced on account of the unique aspects of the property.

The Applicant has also provided an exhibit which identifies a number of statements made by the witnesses regarding the unique aspects of the property.

Testimony was also presented that the roof trusses built by Spencer are very large and cumbersome. While the Department of Planning and Zoning and the Protestants argue that all materials should be stored inside, the unrebutted testimony of the experts called by the Applicant indicates that it would be virtually impossible to construct a building on this site large enough to accommodate the roof trusses as well as personnel, fork lifts, etc.

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These are not standard size trusses but are made to custom size orders reflecting the variety of home construction styles common in Harford County. Some of these trusses exceed 80 feet in length. As a practical matter, a great deal of space is required for adequate storage of these materials and a pillarless building of the size required is simply not an alternative to outside storage.

The Maryland Court of Special Appeals recently concluded that the zoning process in Maryland is at least a two step process subject to the following considerations:

The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is-in and of itself-unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. Unless there is a finding that the property is unique, unusual or different, the process stops here and the variance is denied without any consideration of practical difficulty and/or unreasonable hardship. @ Cromwell v. Ward, 102 Md. App. 691, 651 A.2d 424 (1995).

Based on the testimony of the Applicant's witnesses, the topographical exhibits and photographs presented, and the instruction of the Maryland Court of special Appeals, the Hearing Examiner finds that the subject property is unique within the provisions of Section 267-11 of the Harford County Code and unusual in comparison to other similarly situated properties in the VB district in general and the Village of Jarrettsville in particular.

II. Would the literal enforcement of this Part I result in practical difficulty or unreasonable hardship?

The Applicant seeks to be allowed to maintain the present use of two buildings for assembly of its roof trusses and to continue to utilize the area presently used for outside storage of completed roof trusses prior to shipment. The unrebutted testimony of the witnesses indicate that the trusses constructed by Spencer would require a building impractical, if not impossible, to build. Consequently, the prohibition on outside storage would effectively require the business of Spencer Construction to cease to operate.

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Even if this request were denied, outside storage of roof trusses would still be permitted as a result of the decision in Case 2697, albeit at a less intense level and one that would substantially impact the continued viability of the Spencer business. In other words, the use being made of the property (construction and outside storage of roof trusses) has already been approved, what is considered here is the amount and location of assembly and storage space for that permitted use.

The Maryland Court of Special Appeals has also distinguished between a use variance, which changes the character of the zoning district and where there is a more difficult burden of proving “undue hardship” and an area variance (height, set back, etc.) where there is a lesser burden of proving practical difficulty. The “use” variance was already granted in Case 2697. The Applicant seeks to increase the work space in which his permitted use is conducted and to store completed materials in an area larger than the 2 acres permitted by the Code. At this juncture, the Applicant is seeking an “area” variance and not a “use” variance as to expansion of storage beyond two acres. The standards for approval are as follows:

“To prove undue hardship for a use variance, the following three criteria must be met:

- (1) Applicant must be unable to secure a reasonable return or make any reasonable use of his property (mere financial hardship or opportunity for greater profit is not enough).
- (2) The difficulties or hardships are peculiar to the subject property in contrast with other properties in the zoning district.
- (3) Hardship was not the result of applicant’s own actions.

To prove practical difficulty for an area variance, the following criteria must be met:

- (1) Whether strict compliance with requirement would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome.
- (2) Whether the grant would do substantial injustice to applicant as well as other property owners in the district or whether a lesser relaxation than that applied for would give substantial relief.
- (3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.”

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Anderson v. Board of Appeals, Town of Chesapeake Beach, 22 Md. App. 28, 322 A.2d 220 (1974).

In the opinion of the Hearing Examiner, to require the Applicant to significantly reduce or even cease business operations due to a literal enforcement of the Code results not only in practical difficulty but unreasonable hardship. Adequate screening can be provided on this property which will minimize or eliminate the visual impact associated with such storage. Although the construction of roof trusses was less intense in 1980, the Hearing Examiner in Case 2697 recognized that outside storage of roof trusses was a necessary component of the business of the Applicant and allowed such a use provided adequate screening is provided. Additionally, a denial would effectively hold that a business owner in a VB district may not ever increase the volume of his business or increase the number of items he sells or manufacturers in a manner that may require additional manufacturing, sales or storage space. This is a ridiculous assertion and, in the opinion of the Hearing Examiner offends the spirit and intent of the Zoning ordinance.

III. Will the variance be substantially detrimental to adjacent properties or materially impair the purpose of this Part I?

The Department of Planning and Zoning and the Protestants complain that the uses on the parcel have become far more intense than ever contemplated in the VB zoning district. There are a variety of buildings and businesses on this tract and the business of Spencer's has intensified over the years. While there were complaints of noise in the past, testimony indicated that new machinery has been purchased which reduces the noise of assembly and, because the equipment is faster, reduces the hours of operation. Health department concerns regarding sanitary conditions have been corrected by the addition of bathroom facilities. Each of the buildings on site was constructed pursuant to a valid permit and one of the uses, the school bus use, was approved by the Board of Appeals in Case No. 3030. What we are left with is an examination of whether the utilization of two existing buildings for assembly and increased outside storage will alone be substantially detrimental to adjacent properties.

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The Applicant's noise expert testified that, due to the modernization of the equipment, noise levels emanating from the property have been reduced from prior periods and are well within acceptable limits. This testimony, that prior noise levels have been reduced, was corroborated by several of the protesting witnesses who stated that the worst of the noise was in 1995 to 1996 and occurred late at night in some cases. It was agreed that noise levels have decreased since 1995-96. Additionally, it was conceded that late night hours of operation have been nearly eliminated.

The original conditions of Case 2697 allowed construction, assembly and outside storage of roof trusses on this property. Notwithstanding the decision in the instant case, those uses are permitted on this parcel. What has changed is the number of roof trusses being built and stored. A fair reading of the decision in Case 2697 does not lead to the conclusion that this Applicant was confined as to the number of roof trusses made and stored on the property.

In the opinion of the Hearing Examiner, the grant of the requested variances will not be substantially detrimental to adjacent properties, particularly if such a grant is conditioned upon the installation of adequate visual screening from adjacent properties. Most of the opposition testimony focused upon the visual impacts of the storage and noise generation from assembly equipment (air guns, saws and the like) which can be abated by the addition of solid fencing and additional natural landscaping.

Nor does the Hearing Examiner find that the variances will materially impair the purposes of the Zoning Code. The general purposes of the Zoning Code are set forth at Section 267-3 and provides:

- A. The purpose of this Part 1 is to promote the health, safety, morals and general welfare of the community by regulating the height, number of stories, size of buildings and other structures, the percentage of lot that may be occupied, the size of lots, yards and other open spaces and the location and use of buildings, structures and land for business, industrial, residential and other purposes. This Part 1 is enacted to support the Master Plan and designed to control traffic congestion in public roads; to provide adequate light and air; to promote the conservation of natural resources,

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including the preservation of productive agricultural land; to facilitate the construction of housing of different types to meet the needs of the county's present and future residents; to prevent environmental pollution; to avoid undue concentration of population and congestion; to facilitate the adequate provision of transportation, water, sewerage, schools, recreation, parks and other public facilities; to give reasonable consideration, among other things, to the character of each district and its suitability for particular uses, with a view to conserving the value of buildings and encouraging the orderly development and the most appropriate use of land throughout the county; to secure safety from fire, panic and other danger; and to conserve the value of property.

- B. It is the policy of Harford County, Maryland, that the provisions of this Part 1 or any rule or regulation adopted to administer this Part 1 shall not be interpreted, implemented or intended in any manner so as to regulate, restrict, control, interfere with or govern the use of a person's home with respect to those uses commonly associated with the enjoyment of the home, including but not limited to the rights of parents to educate their children in their own home and the rights of persons to use their own home for religious activities.

The specific purposes of the VB district are set forth at Section 267-38 and provide:

- A. Purpose. This district is intended to provide business services to rural areas and to preserve and enhance the character and function of long-established rural settlements. This district compliments the VR District by providing a mix of business and residential uses at an appropriate scale. Where appropriate, the Historic District Overlay Zone may be used to achieve architectural compatibility between old and new buildings.

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The maximum area for a business use will not be more than 2 acres except construction equipment sales and service (Section 267-38(C)(5)[a]).¹ Outside storage is permitted in the VB district (267-38(C)(5)[e]). It is undisputed that the construction of roof trusses is a “construction service or supply” as defined in the Code (267-4 Definitions). While such services are now allowed only by Special Exception in the VB district, this use is nonetheless approved on this parcel.

Lastly, the Hearing Examiner rejects the notion that this variance should be denied because the hardship created is of the Applicant’s own making. Maryland courts have long recognized that if the unusual circumstances which hinder reasonable use of the property in accord with zoning ordinance restrictions have been caused or created by the property owner or his predecessor in title, hardship cannot be demonstrated since it is essentially self-created and not due solely to the operation of the ordinance upon his property. Wilson v. Mayor & Comm’rs of Town of Elkton, 35 Md. App. 417, 371 A.2d 443 (1977); Cromwell v. Ward (supra); Anderson v. Board of Appeals, Town of Chesapeake Beach, (supra).

It has been argued that the Applicant has created the need for the requested modification and variance due to his construction of other buildings on the property and the consequent intensification of use when the uses on the property are taken as a whole. However, if none of the new buildings had been added after 1980 and no new uses on the parcel commenced, outside storage of roof trusses and additional room for assembly would still be necessary elements of a growing business. The addition of buildings and uses has not created the need for the Applicant’s request but the very nature of his permitted use warrants consideration of additional area to accommodate an ever increasing demand for the Applicant’s product.

¹ The Hearing Examiner emphasizes that the use being made of the property by Spencer is an approved use pursuant to Case No. 2697. While Construction Services and Suppliers is a use permitted today in the VB district only by Special Exception, it is a use nonetheless permitted on this parcel based on the finality of the judgement of the Board of Appeals in Case 2697.

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If the increase in sales of product were deemed to be self-inflicted, then every merchant who successfully increased sales of his product and/or services would be prohibited, under this theory, from increasing storage or manufacturing area, even if his use is a permitted one in the zone. The Hearing Examiner finds that notion unreasonable and one not contemplated by the legislature in drafting the zoning ordinance. Indeed, the Harford County Zoning Code is replete with references to modifications, increases in intensity of use, expansion of existing uses, etc. and provides the necessary safeguards to allow only those variances that meet the standards of Section 267-11.

In the opinion of the Hearing Examiner, the Applicant has met his burden of proof and recommends that the requested modification of the conditions imposed by Case No. 2697 be granted to allow the Applicant to continue his use on the property as described in the testimony presented in the various hearings in this case, namely that buildings currently in use for assembly of roof trusses may continue to be utilized for such use; secondly, that the Applicant be granted the requested variance from the provisions of '267-38(C)(5)(a) to allow a business use in excess of two acres. The hearing Examiner further recommends that the following conditions attach to the requested relief:

1. That the Applicant erect stockade or other suitable fencing together with the addition of vegetative screening that will eliminate from view of neighboring properties and Norrisville Road all of the materials stored outside. That outside storage be permitted only in accordance with the site plans submitted by the Applicant and approved by the Department of Planning and Zoning. Applicant will complete installation of fencing and vegetative screening within 180 days of approval of plans by the Department of Planning and Zoning. Applicant shall provide adequate maintenance to the perimeter fence at all times and shall not allow the fence to fall into disrepair.
2. That no additional buildings or structures of any kind be erected on this parcel beyond those presently erected and existing.
3. That the Applicant not expand its operations beyond current use without first obtaining approval of the Board of Appeals.

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4. That hours of operation for all businesses on site be limited to 6:00 a.m. to 6:00 p.m. Monday through Saturday. No operations permitted on Sunday. Under no circumstances shall operations of any kind be permitted at other times.
5. That the Applicant construct adequate sanitary facilities in accordance with applicable Harford County Health Department Regulations within 90 days of final approval of this application.
6. That the Applicant submit detailed landscaping and erosion control plans for approval to the Harford County Department of Planning and Zoning.
7. That the Applicant obtain at its own expense an inspection regarding rodent infestation on the subject property within 90 days of the date of final approval of this application and submit that report to the Department of Planning and Zoning together with any treatment plan that may be required as a result of said inspection. The Applicant will obtain similar inspections and take any recommended mitigating action no less than semi-annually.
8. That the Applicant obtain any and all permits and inspections.
9. That existing signage be removed immediately and no future signs advertising the businesses located on the property be permitted.
10. That the Applicant purchase a performance bond in the amount of fifty thousand dollars (\$50,000.00) payable in favor of Harford County, Maryland in the event of non-compliance with any of the conditions of this approval. Such bond shall remain in effect as long as the Applicant is engaged in the construction of roof trusses on this site. Evidence of renewal or maintenance of such bond shall be provided to the Harford County Department of Planning and Zoning not less than annually.

Date JANUARY 7, 1999

**William F. Casey
Zoning Hearing Examiner**